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HEALTHCARE BULLETIN

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# GEORGIA'S CERTIFICATE OF NEED LAWS REVISED IN S.B. 433

On April 4, 2008, the Georgia General Assembly passed S.B. 433, which if signed by Governer Perdue, would pave the way for substantial changes to Georgia's Certificate of Need ("CON") law. Below, we provide a summary of S.B. 433 and discuss the potential changes it makes to the existing CON law.

## A. Ambulatory Surgery Centers

Georgia's existing CON law contains an exception for physician-owned single specialty ambulatory surgery centers ("ASCs") with capital expenditures which do not exceed $1,700,000. S.B. 433 would expand the definition of single specialty ASCs to include: (i) general surgery; (ii) a group practice that includes one or more physiatrists who perform services reasonably related to the surgical procedures performed in the center; and (iii) group practices in orthopedics, including plastic hand surgeons with a certificate of added qualifications in Surgery of the Hand from the American Board of Plastic and Reconstructive Surgery. S.B. 433 would also increase the capital expenditure limit to $2,500,000, indexed annually. A single specialty ASC would also be exempt from the CON process if it is the only ASC in the county owned by the group practice and has less than two operating rooms. A CON would be required, however, for expansion.

S.B. 433 also provides an exemption for "joint venture ambulatory surgery centers," which are defined as freestanding ASCs, jointly owned by a hospital in the same county as the center (or an adjacent county if there is no hospital in the same county) and a single group of physicians providing surgery in a single specialty. The interests of the hospital must be no less than thirty percent (30%) and the collective ownership of the physicians or group of physicians must be no less than thirty percent (30%). The capital expenditures threshold for joint venture ASCs must remain under $5,000,000 to qualify for exemption.

S.B. 433 would require Both types of ASCs to provide care to Medicaid beneficiaries and uncompensated or charity care to Georgia residents equal to two percent (2%) or greater if the ASC is a Medicaid participant, or (4%) if not. There are fines for failing to follow any of the rules, including revocation of the ASC's exemption. Ophthalmic ambulatory surgery centers would however be exempt from those rules.

## B. Destination Cancer Hospitals

S.B. 433 establishes rules for the approval of CONs for new types of facilities, called destination cancer hospitals, which would be given special treatment under the CON law. A destination cancer hospital is defined as an institution with a maximum bed capacity of fifty (50) beds that provides diagnostic, therapeutic, treatment, and rehabilitative care services to cancer inpatients and outpatients, by or under the supervision of physicians. The annual patient base must be composed of a minimum of sixty-five percent (65%) of patients who reside outside of the State of Georgia. If the destination cancer hospital fails to keep the out-of-state patient base, it would face steep fines: $2,000,000 for the first year of non-compliance, $4,000,000 for the second year, and $6,000,000 for the third year. If the hospital fails to meet the patient base mark for three out of five consecutive years, it will be fined an addition $8,000,000. The destination cancer hospital would additionally be required to submit annual reports as well as an annual statement showing whether the hospital has met the patient base requirement.

A destination cancer hospital that is granted a CON under the rules promulgated by the Department of Community Health (the "Department") would not be required to obtain a new CON for new institutional health services related to the treatment of cancer. To qualify for a CON, the destination cancer hospital must be located within fifty (50) miles of a commercial airport in Georgia, with at least five (5) runways (i.e. Hartsfield-Jackson Airport). Each facility granted a CON for destination cancer hospital would be required to provide uncompensated indigent or charity care for residents of Georgia which meets or exceeds three percent (3%) of the hospital's adjusted gross revenues and agree to provide care to Medicaid beneficiaries. The destination cancer hospital must also be financially and physically accessible, have a transfer agreement with one or more nearby hospitals and show that it will not be detrimental to hospitals within the area.

S.B. 433 further provides that a "person" (defined to include individuals, corporations, partnerships and limited liability entities and their related entities) may only be issued one CON for a destination cancer hospital. After January 1, 2010, the Department will not accept any applications for a CON for a new destination cancer hospital.

## C. Continuing Care Retirement Communities

S.B. 433 also creates a new exemption for "continuing care retirement communities". A "continuing care retirement community" is defined as an organization whose owner or operator undertakes to provide shelter, food, and either nursing care or personal services, whether such nursing care or personal services are provided in the facility or in another setting, and other services, as designated by agreement, to unrelated individuals. As long as the continuing care retirement community meets certain requirements, including obtaining written exemption from the department, the organization will be exempt from the CON process.

## D. Imaging Centers

S.B. 433 additionally provides that the expansion of an imaging center will be exempt from the CON process if it meets the following requirements: (i) the expansion of services is based on a population needs methodology and the center was in existence and operational beginning January 1, 2008; (ii) it is owned by a hospital or physician or a group of physicians constituting at least eighty percent (80%) ownership and who are board certified in radiology; (iii) it provides three or more diagnostic and other imaging services; and (iv) it accepts all patients regardless of ability to pay and provides uncompensated indigent and charity care in an amount equal to or greater than the amount of care provided by the geographically closest general acute care hospital, unless the imaging center is located in a rural county.

## E. Penalties and Revocation

In addition to the previous grounds for revocation of a CON, such as the intentional provision of false information to the department, S.B. 433 now includes the following as grounds for revocation:

- repeated failure to pay fines;
- failure to maintain minimum quality of care standards;
- failure to participate as a provider of medical assistance for Medicaid purposes; and
- failure to submit timely reports when due.

The CON holder is provided notice and opportunity to be heard in accordance with the Administrative Procedures Act, (but this only applies to CONs issued after July 1, 2008). Fines for operating without a CON will be increased from a maximum of $5,000 per day to $5,000 per day for thirty (30) days, then $10,000 for days thirty-one (31) to sixty (60) and $25,000 per day after sixty (60) days. S.B. 433 also grants the department the authority to conduct investigations to determine whether any CON laws have been violated.

## F. Changes to the CON Procedure

S.B. 433 also massively overhauls the procedures for obtaining a CON. For example, at least thirty (30) days before submitting a CON application, a person will be required to submit a letter of intent. If the bill is enacted into law, the Department will be tasked with the responsibility of issuing rules and forms regarding the letter of intent. Every health care facility will also be required to give the Department prior notice in order to be considered exempt from the CON rules. Current CON rules do not require facilities to undergo the letter of nonreviewability ("LNR") process. The Department would also be required by the statute to issue forms and time frames for which notice will be posted. The notices would be posted for the public and would be subject to opposition.

S.B. 433 sets up a competitive review process, in which applications for similar services would be reviewed together, and in other words, comparatively. The applications would have time-tables or batching cycles so that similar applications can be reviewed together. The Department's time frame for reviewing applications will be increased from ninety (90) to one hundred and twenty (120) days.

S.B. 433 encourages applicants and opposing parties to "meet with the Department" and provide additional information; in fact, if an opposing party does not meet with the Department, then they would lose their standing to appeal an adverse decision. The Health Planning Review Board would be replaced by a Certificate of Need Appeal Panel, which would consist of independent hearing officers who would review the Department's initial decision to grant or deny a CON. The panel would consist of five governor-appointed attorneys, each assigned randomly to appeals. In addition to the new panel, the appeal procedure will be changed. Georgia's Administrative Procedure Act would no longer be utilized for the appeal process. Instead, the appeal process would be set out in the Certificate of Need laws.

## G. Annual Reporting Requirements

All health care facilities that require a CON, and all ambulatory surgical centers and imaging centers (regardless of whether a CON is required) must submit an annual report to the Department. The current CON law only requires hospitals to submit annual reports. S.B. 433 also authorizes the Department to fine facilities who fail to file their annual reports $500.00 per day up to thirty (30) days, and $1000 per day for every day over thirty (30) days. If, after one hundred and eighty days (180) the facility has not submitted its annual report, the Department would be authorized to revoke the facility's CON.

## H. Internal Administrative Changes

The composition of the Health Strategies Council (the "Council") would be changed under S.B. 433. The Council would no longer adopt the State Health Plan; instead, the Board of Community would be charged with the task, as well as publishing rules and service-specific guidelines. The Board of Community Health would also not be required to seek advice of the Council before adopting rules. The licensing of hospitals and medical facilities, which was formerly controlled by the Department of Human Resources, would now come under the Department's control.

## I. Requirements for facilities currently in operation

S.B. 433 would additionally require any ASC currently operating under an exclusion as a physician-owned single specialty ASC, or any diagnostic, treatment, or rehabilitation center offering diagnostic imaging or other imaging services in operation and exempt prior to July 1, 2008; or any facility operating pursuant to a LNR and offering diagnostic imaging services prior to July 1, 2008, to:

- Provide notice to the Department of the name, ownership, location, single specialty, and services provided in the exempt facility;
- Beginning on January 1, 2009, provide annual reports to the Department;
- Provide care to Medicaid beneficiaries and, if the facility provides medical care and treatment to children, to PeachCare for Kids beneficiaries and provide uncompensated indigent and charity care in an amount equal to or greater than two percent (2%) of its adjusted gross revenue; or four percent (4%) if the facility is not a participant in Medicaid or the PeachCare for Kids Program if it makes a capital expenditure over $800,000.00 over a two-year period, builds a new operating room, or relocates.

## J. Miscellaneous

The changes contained in S.B. 433 also include the following:

- The capital expenditure threshold for development of projects would be increased from $900,000 to $2,500,000, adjusted annually. The costs associated with a project have been clarified to exclude the cost of applications, studies, reports, preliminary plans, working drawings, or site acquisition.
- For new and emerging health care services, which are not covered by the rules, the Commissioner is authorized to place a six month moratorium on the services while it creates new rules.
- The Department would review a facility's various quality standards, the ability to obtain necessary personnel, and whether the new service is an underrepresented service.
- Provisions for perinatal services have changed.

S.B. 433 additionally clarifies several exemptions and creates several new exemptions to the CON process, in addition to those mentioned above. They include:

- Federally qualified "religious, nonmedical health care institutions," which replaces the exemption for "Christian Science sanatoriums."
- Expenditures of less than $870,000 for any minor or major repair or replacement of equipment by a non-rural healthcare facility if the facility is not owned by physicians or a hospital that provides diagnostic imaging services, and the facility received a LNR prior to July 1, 2008.

- Expenditures by exempt facilities, for minor or major repairs, including parts or services or equipment, including CT scanners previously approved for CON.
- Expenditures for non-clinical projects like parking lots, decks, computer systems, software and other information technology or medical office buildings and state mental health facilities.
- Diagnostic cardiac catheterization in hospital setting on people fifteen (15) years and older; therapeutic cardiac catheterization in hospitals selected by the for the Atlantic Cardiovascular Patient Outcomes Research Team ("C-PORT") as well as therapeutic cardiac catheterization in hospitals that meet the study requirements but were not selected.
- Infirmaries or facilities operated by Department of Corrections and Department of Juvenile Justice for inmates and residents.
- Relocation of any skilled nursing facility (SNF) or immediate care facility within the same county or other health care facility in a rural county within the same county or any urban facility within a three mile radius of the existing county;
- Traumatic brain injury rehabilitation centers which treat patients continuously for more than twenty-four (24) hours or longer.

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Should you have any questions, please do not hesitate to contact one of our healthcare attorneys at the offices below.

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